MAMAT TALIB
(TIMBALAN KETUA POLIS, JOHOR) & ANOR

v.

ABDUL JALIL RASHID

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOKHTAR SIDIN JCA
ABDUL KADIR SULAIMAN JCA
[CIVIL APPEAL NO: W-01-55-1999]
24 NOVEMBER 2005

PUBLIC SERVANTS: *Dismissal - Dismissal of police constable - Whether non-supplying of notes of proceedings to police constable at enquiry affected validity of dismissal - Whether failure of adjudicating authority to record a finding of guilt against police constable constituted a fatal non-compliance and violation of art. 135(2) Federal Constitution - Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970, reg. 6(2)(c), (6)*

POLICE: *Disciplinary proceedings - Dismissal - Dismissal of police constable for misconduct - Whether non-supplying of notes of proceedings to police constable at enquiry affected validity of dismissal - Whether failure of adjudicating authority to record a finding of guilt against police constable constituted a fatal non-compliance and violation of art. 135(2) Federal Constitution - Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970, reg. 6(2)(c), (6)*

ADMINISTRATIVE LAW: *Public servants - Dismissal of police constable - Whether non-supplying of notes of proceedings to police constable at enquiry affected validity of dismissal - Whether failure of adjudicating authority to record a finding of guilt against police constable constituted a fatal non-compliance and violation of art. 135(2) Federal Constitution - Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970, reg. 6(2)(c), (6)*

The respondent/plaintiff, who was a police constable in the Royal Malaysian Police Force, was dismissed for misconduct. He brought an action against the respondents/defendants claiming a declaration that his dismissal was wrongful and for consequential relief which included an award of damages to be assessed. He succeeded, resulting in the present appeal by the defendants. Initially, four charges were brought against the plaintiff. The fourth charge was

not proceeded with at the enquiry and the plaintiff received only a severe reprimand in respect of the first charge. The plaintiff, however, pleaded guilty to the third charge and claimed to be tried on the second. At the conclusion of the enquiry, the plaintiff was told that he had been dismissed from the force but was not told what the decision was in respect of each of the charges. The learned High Court judge struck down the plaintiff's dismissal because he had not been supplied with the notes of proceedings at the enquiry. The other ground on which the learned judge found for the plaintiff was that there had been a failure on the part of the adjudicating authority to record a finding of guilt against him, the relevant written law being reg. 6 of the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ('the Regulations'). The learned judge treated these instances of non-compliance as a fatal violation of art. 135(2) of the Federal Constitution ('the Constitution').

Held (allowing the appeal and setting aside orders of High Court)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] The notes of proceedings were requested for and refused after the disciplinary enquiry had concluded and the decision to dismiss had been made. So, it could not have had any bearing whatsoever on the procedure that had been adopted. It might have been different if there had been a partial hearing and an adjournment. If, in those circumstances, the plaintiff had asked for the notes recorded at the previous session, it could have been unfair to have refused them if, for example, he needed them to confront a witness or to make a submission. But that was not the fact pattern here. There was, here, no nexus whatsoever between the refusal to supply the notes and the conduct of the enquiry. (p 898 a-b)

[2] It was true that reg. 6(2)(c) and (6) of the Regulations was not complied with. However, the non-compliance had occasioned no prejudice to the plaintiff. A reasonable tribunal armed with the facts available would have come to the same conclusion as the deciding authority in this case. Applying the 'consequences test' formulated by Lord Woolf MR in *R v. Immigration Tribunal, ex p Jeyeanthan*, the breach of reg. 6 had produced no adverse consequence for the plaintiff. It was not enough that the rule of procedure had been breached. The breach must produce consequences adverse to the party complaining of the breach. That requirement was, on the facts, plainly absent. (pp 898 h & 900 b, e)

[2a] The learned judge's reluctance to accept a submission that reg. 6 was merely directory was clearly understandable. It could well be that if his attention had been drawn to *ex p Jeyeanthan*, his decision might well have been different. But this court was unable to agree with the learned judge that the failure to record the conviction violated art. 135(2) of the Constitution. That article required that a person such as the plaintiff be given a reasonable opportunity to be heard. That requirement was amply met on the facts of the case. (p 901 a-b)

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden/plaintif, seorang konstabel polis dalam pasukan Polis Di Raja Malaysia, telah dibuang kerja kerana kesalahan salahlaku. Beliau mengambil tindakan terhadap defendan/responden untuk deklarasi bahawa pembuangan kerjanya adalah salah di sisi undang-undang dan bagi mendapatkan award gantirugi serta lain-lain relif susulan. Beliau berjaya, sekaligus membangkitkan rayuan defendan di sini. Awalnya, terdapat empat pertuduhan yang dikemukakan terhadap plaintif. Semasa siasatan, pertuduhan keempat telah digugurkan dan plaintif hanya dihukum celaan keras bagi pertuduhan pertama. Plaintif, bagaimanapun mengaku bersalah atas pertuduhan ketiga dan mengaku tidak bersalah atas pertuduhan kedua. Di akhir siasatan, plaintif diberitahu bahawa beliau telah disingkir dari pasukan, tetapi tidak diberitahu apakah hukuman bagi setiap satu pertuduhan. Yang arif hakim Mahkamah Tinggi mengenepikan pembuangan kerja plaintif atas alasan ia tidak diberikan nota prosiding semasa siasatan. Alasan lain yang menyebabkan yang arif hakim berpihak kepada plaintif adalah bahawa terdapat kegagalan di pihak autoriti pengadilan untuk merekodkan suatu dapatan bersalah terhadap plaintif, yang mengikut yang arif hakim telah melanggar per. 6, Peraturan-Peraturan Polis (Kelakuan dan Tatatertib) (Pegawai Polis Pangkat Rendah dan Konstabel) 1970 ('Peraturan'). Yang arif hakim menganggap ketidakpatuhan-ketidakpatuhan ini adalah fatal kerana melanggari fasal 135(2) Perlembagaan Persekutuan ('Perlembagaan').

Diputuskan (membenarkan rayuan dan mengenepikan perintah-perintah Mahkamah Tinggi)
Oleh Gopal Sri Ram HMR (menyampaikan penghakiman mahkamah):

[1] Berdasarkan fakta kes, nota prosiding telah dipohon dan ditolak setelah siasatan disiplin selesai dan keputusan membuang kerja dibuat. Oleh yang demikian, ia sama sekali tidak mempunyai pengaruh terhadap prosedur yang dipakai. Keadaan mungkin berbeza sekiranya siasatan hanya didengar sebahagiannya dan ditangguh. Sekiranya, dalam keadaan sedemikian, plaintif memohon diberikan nota yang direkod di prosiding sebelumnya, maka adalah tidak adil untuk menolaknya jika, sebagai

contoh, ia diperlukan bagi menyangkal seorang saksi atau bagi merumuskan hujah. Ini bagaimapun bukanlah fakta yang berlaku di sini. Tiada sebarang nexus yang boleh menghubung keengganan untuk memberi nota dengan cara siasatan dijalankan.

[2] Adalah benar bahawa per. 6(2)(c) dan (6) Peraturan tidak dipatuhi. Bagaimanapun, selepas mengkajinya dengan mendalam, keputusan kami adalah bahawa ketidakpatuhan tersebut tidak menyebabkan sebarang prejudis kepada plaintif. Ini kerana suatu tribunal yang munasabah, berhadapan dengan fakta yang ada, akan mencapai keputusan yang sama sepertimana yang dicapai oleh autoriti pengadilan di sini. Dengan demikian, dengan memakai ujian akibat yang dicetus oleh Lord Woolf MR dalam *R v. Immigration Tribunal ex parte Jeyeanthan*, pelanggaran per. 6 Peraturan tidak menyebabkan apa-apa akibat buruk terhadap plaintif. Bahawa kaedah prosedur telah dilanggar tidak memadai. Pelanggaran mestilah membuahkan akibat buruk kepada pihak yang merungut. Syarat ini, atas fakta kes semasa, jelas tidak wujud.

[2a] Keenggan yang arif hakim untuk menerima hujah bahawa per. 6 hanyalah bersifat arahan memang boleh difahami. Mungkin, jika tumpuan beliau diarahkan kepada *ex parte Jeyeanthan*, keputusannya akan berbeza. Tetapi mahkamah ini tidak dapat bersetuju dengan yang arif hakim bahawa kegagalan merekodkan sabitan telah melanggar fasal 135(2) Perlembagaan. Fasal tersebut memerlukan seseorang seperti plaintif di sini diberi hak munasabah untuk didengar. Dalam kes di sini, berdasarkan fakta, kehendak tersebut telah dengan jelas dipenuhi.

Case(s) referred to:

Anisminic Ltd v. Foreign Compensation Commission [1969] 2 AC 147 ***(refd)***

B Surinder Singh Kanda v. Government of the Federation of Malaya [1962] 2 MLJ 169 ***(refd)***

Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd [2003] 3 CLJ 532 CA ***(refd)***

Ghazi Mohd Sawi v. Mohd Haniff Omar & Anor [1994] 2 CLJ 333 SC ***(refd)***

Hj Ali Hj Othman v. Telekom Malaysia Bhd [2003] 3 CLJ 310 CA ***(refd)***

Kioa v. West [1985] 159 CLR 550 ***(refd)***

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2000] 3 CLJ 224 CA ***(refd)***

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2001] 2 CLJ 525 FC ***(refd)***

Mokhtar Amin v. Mohamed Moktar Omar [2001] 4 CLJ 489 CA ***(refd)***

R v. Immigration Tribunal, ex p Jeyeanthan [1999] 3 All ER 231 ***(foll)***

Sentivelu v. Public Services Commission [2005] 3 CLJ 778 CA ***(refd)***

The Board of Education of the Indian Head School v. Knight [1990] 1 SCR 65 ***(refd)***

Legislation referred to:
Federal Constitution, art. 135(2)
Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970, reg. 6(2)(c), (6)

For the appellants - Amarjeet Singh SFC
For the respondent - Karpal Singh; M/s Karpal Singh & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S2-23-54-93]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

The respondent before us (plaintiff in the court below) was a Police Constable in the Royal Malaysian Police Force. He was dismissed for misconduct. He brought an action against the respondents (defendants in the court below) claiming a declaration that his dismissal was wrongful and for consequential relief which included an award of damages to be assessed. He succeeded. The defendants now appeal to us.

The facts of the case have been interrogated fully by the trial judge and it therefore suffices to deal with them briefly. Four charges were brought against the plaintiff. The first alleged that he had quarrelled with his wife and was therefore guilty of conduct unbecoming of a member of the Force. The second alleged that he had been found in a hotel room with an underaged girl and had by his conduct brought the Force into disrepute. The third alleged that he had, in the course of a departmental investigation, lied that he had married one Nafisah bte Abd Kadir. We will not mention the fourth charge as it was not proceeded with at the inquiry. The first charge is also irrelevant to the plaintiff's claim as he received only a severe reprimand on it. The plaintiff pleaded guilty to the third charge and claimed to be tried on the second. At the conclusion of the inquiry the plaintiff was told that he was dismissed from the force. But he was not told what the decision was in respect of each of the charges.

The learned judge struck down the plaintiff's dismissal because he had not been supplied with the notes of proceedings at the enquiry. According to the trial judge, "the non-supplying of the notes of proceedings goes to the validity of the decision making process of the orderly room proceedings against the plaintiff held on 7 June 1990." With respect we do not agree. We will explain why.

We begin with what we consider to be the following well-established propositions:

(i) A decision by a public law decision-maker may be struck down by the courts on grounds of procedural unfairness or Wednesbury unreasonableness (see, *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147).

(ii) The content of procedural fairness is not fixed. It is a flexible concept and whether there has been procedural fairness in a given case depends on the facts and circumstances of that case. See, *The Board of Education of the Indian Head School v. Knight* [1990] 1 SCR 65; *Haji Ali bin Haji Othman v. Telekom Malaysia Berhad* [2003] 3 CLJ 310.

(iii) The essential requirements of an acceptable procedure is that it be fair and impartial. See, *B Surinder Singh Kanda v. Government of the Federation of Malaya* [1962] 2 MLJ 169. Fairness includes, but is not confined to, the right to be heard which in some cases may be satisfied by the grant of a right to make written representations (*Ghazi bin Mohd Sawi v. Mohd Haniff bin Omar & Anor* [1994] 2 CLJ 333) whilst in others it can only be satisfied by an oral hearing. See, *Sentivelu v. Public Services Commission* [2005] 3 CLJ 778.

(iv) The test to determine whether the particular procedure adopted in a given case was fair is subjective. The court must place itself in the shoes of the decision-maker and decide whether the procedure adopted provided adequate fairness to the person concerned. See, *Kioa v. West* [1985] 159 CLR 550 where Brennan J said:

> What the principles of natural justice require in particular circumstances depends on the circumstances known to the repository at the time of the exercise of the power or the further circumstances which, had he acted reasonably and fairly, he would then have known. The repository of a power has to adopt a reasonable and fair procedure before he exercises the power and his observance of the principles of natural justice must not be measured against facts which he did not know and which he would not have known at the relevant time though he acted reasonably and fairly. As the obligation to observe the principles of natural justice is not correlative to a common law right but is a condition governing the exercise of a statutory power, the repository satisfies the condition by adopting a procedure which conforms to the procedure which a reasonable and fair repository of the power would adopt in the circumstances when the power is exercised. When the question for the court is whether the condition is satisfied, **the court must place itself in the shoes of the repository of the power to determine whether the procedure adopted was reasonable and fair.** (emphasis added.)

On the facts of the present case the notes of proceedings were requested for and refused after the disciplinary enquiry had concluded and the decision to dismiss had been made. So, it could not have had any bearing whatsoever on the procedure that had been adopted. It may have been different if there had been a partial hearing and an adjournment. If, in those circumstances the plaintiff had asked for the notes recorded at the previous session, it may have been unfair to have refused them if, for example, he needed them to confront a witness or to make a submission. But that is not the fact pattern here. There is, here, no nexus whatsoever between the refusal to supply the notes and the conduct of the enquiry.

The other ground on which the learned judge found for the plaintiff was that there had been a failure on the part of the adjudicating authority to record a finding of guilt against him. The relevant written law is reg. 6 of the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 the relevant parts of which read as follows:

> 6(1) The charge shall be read out to the officer by the adjudicating authority and if necessary explained to him. He shall then be called upon to plead to the charge.
>
> (2) If the officer pleads guilty:
>
> (a) the adjudicating authority shall record briefly the facts in support of the charge and shall explain them to the officer. The facts will be obtained by questioning any officer or witness who has knowledge of the facts, or if the adjudicating authority has been supplied with any documents containing the facts of the charge, by reference to such documents;
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> (b) the officer shall then be invited to make any statement he wishes in extenuation of the offence. Such statement shall be recorded, or if he has nothing to say, such fact shall be recorded;
>
> (c) the adjudicating authority shall then record a finding of guilt and award a punishment in respect of the offence.
>
> (6) The adjudicating authority shall record its finding on the evidence. If the finding is one of guilty, the officer shall be invited to make any statement he wishes in extenuation of the offence. Such statement shall be recorded, or if he has nothing to say, that fact shall be recorded.

It is true that regs. 6(2)(c) and 6(6) were not complied with. The learned judge treated these instances of non-compliance as fatal because of the use of the word "shall" appearing in the relevant paragraphs of the regulation. With respect, we are unable to agree with the learned judge's approach.

The correct approach to determine whether a particular procedural provision is mandatory is not the fact that it employs words that *prima facie* carry a tenor of compulsion; for example, the word "shall". The correct test is that stated by Lord Woolf MR in *R v. Immigration Tribunal ex parte Jeyeanthan* [1999] 3 All ER 231 which was applied by this court in *Mokhtar bin Amin v. Mohamed Moktar bin Omar* [2001] 4 CLJ 489 and *Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd* [2003] 3 CLJ 532. We quote from the judgment of the then Master of the Rolls:

> An examination of the relevant authorities, the leading textbooks and the numerous authorities to which they refer confirm the limitations of applying a solely mandatory/directory classification (see *Wade and Forsyth Administrative Law* (7th edn 1994) p 255; *Supperstone and Goudie Judicial Review* (2nd edn 1997) Ch 4 and *de Smith, Woolf and Jowell Judicial Review of Administrative Action* (5th edn 1995) pp 265-271). Frequently the investigation involves doing no more than deciding the sense in which the word 'shall' has been used as part of a particular procedural requirement. As the word 'shall' is normally inserted to show that something is required to be done, the exercise tends to be an unrewarding one. **Much more important is to focus on the consequences of non-compliance.** Here the authorities show no constant pattern. This is the result of courts in those cases focusing on the issue of whether or not a requirement is mandatory and ignoring or failing to pay sufficient attention to the issue of the consequences of non-compliance with, in particular, a mandatory requirement. (emphasis added.)

In a later passage the Master of the Rolls said this:

> … I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows: Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question). Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)
>
> Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver.

Mr Karpal Singh submits that the consequences of failure to record a conviction is that his client was deprived of making a plea in mitigation so as to obtain a lesser punishment than dismissal. We accept that there is much force in learned counsel's argument and we must confess that it has given us much anxiety in this case. But after very careful consideration, we have come to the conclusion that the non-compliance has occasioned no prejudice to the plaintiff. That is because a reasonable tribunal armed with the facts available would have come to the same conclusion as the deciding authority in this case.

Put aside the second charge for a moment. The third charge to which the plaintiff pleaded guilty is a serious one. Telling a lie to internal investigators is conduct that most certainly brings the Force into disrepute. It shows a lack of the required calibre of an officer in the position of the plaintiff. Police officers as enforcers of the law are expected to observe a code of conduct above that of ordinary citizens. It is vital that standards are kept as high as possible so that the public confidence in our premier law enforcement agency – His Majesty's Police Force – is not eroded. Hence no judgment of this court must have the conscious effect of lowering the standards established by those in charge of maintaining discipline in the Force.

There is no doubt that a reasonable tribunal armed with the facts set out in the third charge established by the plaintiff's plea of guilt would have found him guilty and ordered his dismissal. So, applying the consequences test formulated in *ex parte Jeyeanthan* we find that the breach of r. 6 has produced no adverse consequence for the plaintiff. In our judgment, it is not enough that the rule of procedure has been breached. The breach must produce consequences adverse to the party complaining of the breach. That requirement is, on the facts of the present instance, plainly absent.

In his judgment the learned judge said this:

> I reject the defendants' argument that the failure to record the finding of guilt is merely an irregularity. This failure to record such an important factor in the proceedings clearly affects the validity of the decision making process of the proceedings. Whilst it is easy to assume as suggested by Mr Amarjeet Singh for the defendants that since the plaintiff was given an opportunity to plead in mitigation the non-recording of the finding of guilt is merely directory as being purely procedural and does not give the plaintiff a legal right of redress in a Court of law, such an assumption falls foul of article 135(2) of the Federal Constitution …

We can well understand the learned judge's reluctance to accept a submission that reg. 6 was merely directory. It may well be that if his attention had been drawn to *ex parte Jeyeanthan* his decision may well have been different. But we are unable to agree with the judge that the failure to record the conviction violates art. 135(2). That article requires that a person such as the instant plaintiff be given a reasonable opportunity to be heard. That requirement was amply met on the facts of this case. We are also unable to accept Mr. Karpal Singh's contention that his client reasonably lost an opportunity to make a plea in mitigation, and that therefore he had no reasonable opportunity to be heard. At one point in time we thought that the deprivation of the right to enter a plea in mitigation vitiated the decision making process. We said so in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2000] 3 CLJ 224. But we were reversed. See, *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525. And so we return to the main point in this case. It is that the breach of reg. 6 has had no adverse consequences for the plaintiff.

There is one other point. The learned judge, apart from directing the assessment of emoluments, also directed damages to be assessed. That order is, with respect, wrong. In the case of a public servant, an order of reinstatement at common law may be made. That has the effect of putting a plaintiff in the same position as he would have been had he not been dismissed. So he will get all his arrears of salary. But he is not entitled to damages in addition. That would be bad for double accounting.

For the reasons given, we would allow the appeal and set aside the orders of the High Court. As for costs we must say this. The appeal succeeds not entirely because of the arguments presented by the defendant. That is not to say that Mr Amarjeet Singh has not been of assistance. He has. But this is a case where justice requires that there be no order as to costs here and below.